

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Auburn Manufacturing, Inc.	)	Docket No. CWA-2-I-93-1048
	)	
Respondent	)	

SUMMARY OF TELEPHONE CONFERENCE

STATEMENT OF AGREEMENTS AND RULING

This document summarizes for the record the August 25, 1993 telephone conference, and states for the record the agreements reached and ruling issued during the conference. Representing Complainant was Andrew Warren, and representing Respondent was Jeffrey L. Turner.

In the conference, it was agreed that the parties would try again to negotiate a settlement, and that Complainant would report by September 30, 1993 on the status of the negotiations. It was further agreed that both Complainant's June 9, 1993 Request for Extension of Time and Respondent's June 30, 1993 Request for Extension of Time were granted.

Finally, it was ruled that Complainant's Motion for Default--based on Respondent's filing its prehearing exchange six days late--was denied. Respondent, in its filing, attributed its delay to its having initially believed mistakenly that it was to meet Complainant and prepare a joint submission for the exchange; and Respondent added that Complainant had indicated that it had no

objection to the late filing.

Complainant's default motion was grounded on Section 22.17 of the Agency's Consolidated Rules of Practice (40 C.F.R. §22.17), which authorize the issuance of a default order upon a party's failure to comply with a prehearing order. Complainant claimed that it had told Respondent that the prehearing exchange was not to be a joint submission, and denied that it had indicated to Respondent a lack of any objection to Respondent's late filing. In this situation, Complainant argued that Respondent's failure to file timely suggested an indifference to the proceedings and bad faith. Moreover, Complainant contended that Respondent obtained an advantage by submitting its prehearing exchange only after it had read Complainant's.

Respondent's reply, supported by affidavit of counsel, disclaimed any indifference to the proceedings, citing Respondent's participation in settlement discussions. The discrepancies between the parties' accounts of their communications regarding a joint submission and Complainant's possible objection to a late filing were, asserted Respondent's reply, simply a genuine misunderstanding. Respondent's reply noted further that Respondent promptly submitted its prehearing exchange upon learning of its delinquency. Finally, Respondent said that its prior receipt of Complainant's prehearing exchange afforded it no advantage, since it had previously disclosed to Complainant its basic position.

On this set of facts, Respondent's six-day lateness in filing its prehearing exchange falls short of the gravity of default appropriate for concluding this proceeding on that basis. As

stated in decisions of other Judges in this Office, a default order is a disfavored remedy because of its harshness, and cases are to be decided on their merits whenever reasonably possible. Default orders are issued normally only where a party has clearly evidenced indifference or bad faith or has significantly impeded the proceedings. (See In the Matter of City of Venice, Docket No. CWA-IV-91-545, Order Denying Motion for Default and Setting Prehearing Exchange Date (March 11, 1992); In the Matter of Thoro Products Co., [CERCLA/EPCRA] Docket No. EPCRA VIII-90-04, Order Denying Motion for Default Judgment and Granting Motion for Extension of Time to File Prehearing Exchange and Setting Further Procedures (March 6, 1991); In the Matter of District of Columbia, Blue Plains Advanced Wastewater Treatment Plant, Docket No TSCA-III-422, Order (January 28, 1991).

In the instant case, the affidavit of Respondent's counsel is perfectly plausible, and as such it sufficiently answers Complainant's suggestions of indifference and bad faith. As to any prejudice to Complainant from having submitted its prehearing exchange first, in addition to Respondent's representation that it had previously informed Complainant of its basic position, the parties will be given a chance to reply to each other's exchange. If Complainant subsequently identifies any prejudice to it from these arrangements, the matter can be addressed then. In sum, Respondent's six-day lateness in filing its prehearing exchange is of course not condoned; but it was a minor delinquency, undeserving of any sanction approaching the harshness of a default order.

Accordingly, as stated above, Complainant's Motion for Default is denied.

Dated: August 31, 1993

Thomas W. Hoya  
Thomas W. Hoya  
Administrative Law Judge

In the Matter of Auburn Foundry, Inc., Respondent  
Docket No. V-W-91-R-19

Certificate of Service

I certify that the foregoing Order and Summary of Telephone Conference Statement of Agreements and Ruling, dated August 31, 1993, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

Marie Hook  
Regional Hearing Clerk  
U.S. EPA  
77 West Jackson Boulevard  
Chicago, IL 60604-3590

Copy by Regular Mail to:

Attorney for Complainant:

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Maria Whiting  
Legal Staff Assistant

Dated: August 31, 1993